STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2005
v	No. 253943 Saginaw Circuit Court
RONALD ALLEN JOHNSON, Defendant-Appellant.	LC No. 02-021183-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, carrying a dangerous weapon with unlawful intent, MCL 750.226, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 4 to 10 years for his conviction of carrying a dangerous weapon with unlawful intent, 5 to 10 years for his conviction of possessing of a firearm as a felon, and 18 to 40 years each for his convictions of conspiracy to commit armed robbery, first-degree home invasion, and assault with intent to rob while armed. Defendant was also sentenced to consecutively serve a two-year term of imprisonment for his felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing or articulation of substantial and compelling reasons to support a departure from the appropriate sentencing guidelines range.

Defendant was tried with codefendants David Barker and Freddie Williams in connection with a home invasion, during which the residents of the home were held at gunpoint while the intruders searched for money and drugs. On appeal, defendant first argues that the trial court erred in denying his motion to sever his trial from that of his codefendants. Specifically, defendant argues that he was unfairly disadvantaged because the joinder of trials hindered his ability to argue that Barker and Williams were to blame for the home invasion. We disagree. The decision to sever a joint trial is reviewed for an abuse of discretion. See *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

"The general rule is that a defendant does not have a right to a separate trial." *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). However, "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid

prejudice to substantial rights of the defendant." MCR 6.121(C). The defendant must provide the trial court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, *supra*. "Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id*. at 349.

Initially, we note that defendant's argument is logically inconsistent. Defendant argues that while he was unable to point to Barker and Williams as the perpetrators because they appeared beside him at trial, Barker and Williams could nonetheless point to defendant as the guilty party. Certainly each of the three codefendants was similarly situated with respect to the capacity and ability to point to the other two as being guilty of the crimes charged. Additionally, defendant's theory of defense was not irreconcilable with those of his codefendants. *Id*. Indeed, all three codefendants argued that they had not broken into the victims' home. The record shows that defendant was not hindered in his ability to argue this theory at trial. We also note that the trial court specifically instructed the jury that the fact that the codefendants were "on trial together is not evidence that they are associated with each other [or] that either one of them is guilty." Juries are presumed to follow the instructions given to them by the trial court, *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001), and we see nothing in the record before us to indicate that the jury here did not do so. Accordingly, we conclude that defendant's substantial rights were not undermined by the denial of his motion to sever.

Defendant next argues that the trial court erred in denying his request to instruct the jury regarding attempted armed robbery and felonious assault, as lesser included offenses of assault with intent to rob while armed. Again, we disagree. We review de novo alleged errors in the instruction of a jury. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The question of whether an offense is a necessarily lesser included offense of a greater crime is also a question of law that is reviewed de novo on appeal. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

A trial court must instruct on a lesser offense only if it is necessarily included in the greater offense and a rational view of the evidence supports the instruction. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." *Mendoza*, *supra* at 532 n 3. Where the lesser offense is a necessarily included lesser offense, instruction on the lesser offense is required if "the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

The elements of assault with intent to rob while armed are an assault, committed with force or violence and an intent to rob or steal while the defendant is armed. MCL 750.89; *People v Federico*, 146 Mich App 776, 790; 381 NW2d 819 (1985). In contrast, the crime of attempt consists solely of "'an intent to do an act or to bring about certain consequences which would in law amount to a crime, and an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.'" *People v Adams*, 416 Mich 53, 59 n 5; 330 NW2d 634 (1982), quoting LaFave & Scott, Criminal Law, § 59, p 423. In *Adams*, *supra* at 58-59, our Supreme Court held that attempted robbery is a cognate lesser offense of assault with intent to rob while armed, not a necessarily included lesser offense. In doing so, the Court reasoned that "[n]either

an attempt to commit an offense nor all its elements are elements of the completed offense. . . . If the elements of armed robbery were successively peeled away, singly or in various combinations, the offense of attempt to commit armed robbery, or any necessarily included offense of armed robbery, would not emerge."[1] *Id*. Therefore, because attempted armed robbery is not a necessarily included lesser offense of assault with intent to rob while armed, the trial court did not err in declining to instruct the jury on the former.

As for the requested instruction on felonious assault, although that crime is a necessarily included lesser offense of assault with intent to rob while armed, *People v Stubbs*, 110 Mich App 287, 291; 312 NW2d 232 (1981), a rational view of the evidence and arguments presented at trial did not support giving the instruction. Again, defendant's primary theory of defense was that he was not one of the three men who broke into the victims' home. Additionally, there was ample evidence adduced that the men who broke into the victims' home did so with the intent to rob or steal. Specifically, there was testimony from the victims that the men demanded money and searched the home, going through drawers and the refrigerator. Given this evidence, we find no error in the trial court's refusal to instruct the jury regarding felonious assault.

Defendant next argues that the trial court erred in assessing him twenty-five points for offense variable (OV) 13, and asserts that this scoring error caused the trial court to base his sentence for assault with intent to rob while armed on an incorrect guidelines range of 108 to 270 months' imprisonment. Defendant argues that, scored properly, his guidelines range should have been 81 to 202 months' imprisonment. The prosecution concedes that the trial court should have scored zero points for OV 13, and that defendant's proper guidelines range should have been 81 to 202, rather than 108 to 270, months' imprisonment. We agree.

MCL 777.43 instructs a court to score twenty-five points under OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Citing defendant's instant convictions of conspiracy to commit armed robbery, first-degree home invasion, assault with intent to rob while armed, and carrying a dangerous weapon with unlawful intent, the trial court concluded that OV 13 was properly scored at twenty-five points because each of the cited offenses constitute a crime against the person for purposes of MCL 777.43(1)(b). However, as argued by defendant both at sentencing and on appeal, although the offenses of first-degree home invasion and assault with intent to rob while armed constitute crimes against a person for purposes of the sentencing guidelines, see MCL 777.16d and MCL 777.16f, the offenses of conspiracy and carrying a dangerous weapon with unlawful intent are classified as crimes against public safety, see MCL 777.18 and MCL 777.16m. Consequently, we agree that the trial court improperly scored OV 13 at twenty-five points; rather, no points should have been scored. See MCL 777.43(1)(g). Moreover, because the reduction in score for OV 13 places defendant's sentence for his conviction of assault with intent to rob while armed above the appropriate sentencing guidelines,[2] we must remand this

[1] *Adams* implicitly overruled this Court's holding in *People v Bryan*, 92 Mich App 208, 225; 284 NW2d 765 (1979), that attempted robbery is a necessarily included lesser offense of assault with intent to rob while armed. Defendant's reliance on *Bryan* is, therefore, misplaced.

[2] The trial court's scoring of the guidelines for defendant's assault with intent to rob while armed
(continued…)

case for resentencing or articulation of a substantial and compelling reason for a departure from that range. See MCL 769.34.

In doing so, however, we reject defendant's claim that he was entitled at sentencing, and thus remains entitled on remand, to preparation of a sentencing information report for each of the enumerated felonies for which he was convicted. As recently recognized by this Court in *People v Mack*, ___ Mich App ___; ___ NW2d ___ (2005), when sentencing a defendant for multiple concurrent convictions a trial court is required to prepare a sentencing information report only "for the highest crime class felony conviction . . . ." *Id*. at ___, citing MCL 777.14. Because, as a class A offense against a person, defendant's conviction of assault with intent to rob while armed constitutes the highest crime class felony for which defendant was convicted, he was entitled to preparation of a sentencing information report for that conviction only.

Additionally, we sua sponte note that the trial court erred in ordering that the two-year mandatory sentence for defendant's conviction of felony-firearm be served consecutively to each of the other sentences imposed by the court. In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), our Supreme Court held that a felony-firearm sentence is to run consecutively only to the sentence for the underlying or predicate offense, not to all other felonies of which a defendant is convicted. In this case, defendant's conviction of first-degree home invasion constitutes the predicate felony for the sole count of felony-firearm of which defendant was convicted. Consequently, defendant's sentence for the felony-firearm conviction should run consecutively only to his conviction of first-degree home invasion. *Id*.

We affirm defendant's convictions, but remand this matter to the trial court for resentencing or articulation of substantial and compelling reasons to support a departure from the sentencing guidelines range. Regardless of which procedure is employed by the trial court, a judgment of sentence appropriately reflecting the consecutive nature of defendant's felony-firearm conviction must be entered by the trial court on remand. See MCR 7.216(A)(7). We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette

(…continued)

conviction placed defendant in prior record level D and offense variable level III for class A offenses against the person, resulting in a minimum sentence range of 108 to 225 months imprisonment, as a third habitual offender. Reduction of OV 13 to a score of zero places defendant in offense variable level II, and results in a new sentencing guidelines' range of 81 to 202 months' imprisonment. Thus, defendant's minimum sentence of eighteen years', i.e., 216 months', imprisonment for his conviction of assault with intent to rob while armed exceeds the applicable guidelines' range.